No. 43112-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

PETER TVEDT,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-00883-7
The Honorable Elizabeth Marten, Judge

OPENING BRIEF OF APPELLANT

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3. The trial court erred when it ruled that testimony describing an uncharged prior offense was more probative than prejudicial.

4. Peter Tvedt was denied his right to a fair trial because the trial court admitted testimony describing an uncharged prior offense under RCW 10.58.090, which has been ruled unconstitutional by the Supreme Court, and because the evidence is not alternatively admissible under ER 404(b), and a necessary limiting instruction was not given.

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1. Did the trial court commit reversible error when it admitted testimony describing an uncharged prior offense under RCW 10.58.090, where that statute has been declared

unconstitutional? (Assignment of Error 1 & 2)

2. Was testimony describing an uncharged prior offense alternatively admissible under ER 404(b) to show a common scheme or plan, where the charged incident and the prior alleged incident were separated in time by over ten years and did not share sufficient common features? (Assignment of Error 3 & 4)

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III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Peter Tvedt by Information with one count of rape of a child in the second degree (RCW 9A.44.076) and one count of intimidating a witness (RCW 9A.72.110(1)(d)). (CP 1-2)

Before trial, the prosecutor sought permission, under RCW 10.58.090 and ER 404(b), to introduce testimony from the victim's

stepmother alleging that Tvedt attempted to sexually assault her around the year 2000, when she was 19 years old. (CP 8-24) Tvedt objected to the admission of the testimony on substantive grounds, and on the grounds that the statute was unconstitutional. (CP 25-47; RP 47-51, 98-100) Following an offer of proof (CP 59-69), the trial court ruled that the testimony was admissible under RCW 10.58.090 but not ER 404(b). (RP 100-02)

The jury convicted Tvedt as charged. (RP 632; CP 101-02) Tvedt subsequently filed a motion to arrest judgment or for a new trial because the Washington State Supreme Court had just ruled that RCW 10.58.090 was unconstitutional. (CP 103-29; RP 639-43) The trial court denied the motion, and sentenced Tvedt within his standard range to 114 months to life in prison. (CP 133-35, 139, 142, 145, 157; RP 644, 646, 655) This appeal timely follows. (CP 158)

B. SUBSTANTIVE FACTS

In February of 2011, then 13-year old H.P. lived with her father, Jack Pittman, and her step-mother, Crystal Pittman, in their Spanaway, Washington home. (RP 116, 120, 185, 234) Crystal's father, Peter Tvedt, who had recently divorced Crystal's mother after 33 years of marriage, came to stay with the Pittmans while he

got himself settled after his move from Hawaii to Washington.[1] (RP 118, 187, 234, 450-51)

According to H.P., she was uncomfortable with Tvedt's presence in the home because her aunt told her that Tvedt tried to sexually assault Crystal. (RP 190-91) So H.P. and Tvedt had very little contact. (RP 109-10, 218-19)

H.P. did not have school on February 22, and fell asleep the night before while watching television on the living room couch. (RP 194) She testified that she awoke that morning when Tvedt said in her ear, "I'm gona f**k, and you're not going to scream." (RP 195) H.P. did scream for her father to help, but her parents were both at work. (RP 195)

H.P. testified that she backed away from Tvedt and begged him not to, and that he responded, "Suck my c**k." According to H.P., Tvedt unzipped his pants, but when she touched his penis it was wet and she pulled her hand away. (RP 197) Then Tvedt told her, "It's come. Get over it." (RP 197) H.P. told Tvedt that she did not know what to do so, according to H.P., Tvedt placed her fingers in his mouth and demonstrated making a back-and-forth motion.

[1] The witnesses in this case who share a last name will be referred to by their first names throughout this brief.

(RP 197) H.P. testified that she complied and put Tvedt's penis in her mouth. (RP 198)

Immediately after the incident, H.P. looked at the clock and saw it was 6:20 in the morning. (RP 200) She immediately went to the bathroom and locked the door. (RP 200) According to H.P., Tvedt knocked on the door and told her that if she told anyone he would beat her, and that if he went to jail because of her, he would "beat the shit out of" her when he got out. (RP 201)

H.P. then went to her bedroom, and noticed that a white substance she saw come out of Tvedt's penis was now on her shirt. (RP 198-99) She changed her clothes and pretended to get ready for school. (RP 202, 203) As she was leaving the house, Tvedt apologized, explaining that sometimes he "gets a little crazy." (RP 204) He told H.P. that he would move out if she wanted him to, and that he would understand if she decided to tell someone. (RP 205) H.P. testified that she told him that he should leave, and he agreed. (RP 205)

H.P. heard Tvedt taking a shower, then saw him pack his things into his car and drive away. (RP 206) H.P. then called her aunt, Joanna Naylor, and asked her to come over. (RP 207-08) Naylor and her friend, Jennifer Buchanan, drove to the Pittman

house and arrived at approximately 10:00AM. (RP 314, 315) H.P. was crying and hysterical, and at first would not tell the women what happened. (RP 266, 268, 318, 319) But eventually H.P. told Naylor her story, and Naylor called H.P.'s parents. (RP 121, 271, 276-77)

H.P. was still upset and crying when Jack and Crystal arrived, but H.P. eventually told them what had happened. (RP 121, 133, 239, 240) Crystal called the police, and later that day Jack took H.P. to Mary Bridge Children's Hospital for a forensic interview and physical examination. (RP 135, 241, 424, 428, 433) Naylor also collected H.P.'s shirt, put it into a bag, and turned it over to the responding police officers. (RP147-48, 242, 278, 280)

Earlier that morning, Crystal had received a voice mail message from Tvedt explaining that he felt "cooped up" and had decided to move out. (RP 243-44) He also said he would contact her another day to arrange a time to retrieve his belongings. (RP 243)

Subsequent tests performed on the stain on H.P.'s shirt indicated that the substance was semen. (RP 385-86, 414-15) A DNA comparison showed a match between the semen and an oral swab taken from Tvedt after his arrest. (RP 393-94) But there

was no trace of semen on an oral swab taken from H.P. during her medical exam. (RP 385-86, 388)

At trial, Crystal testified about an alleged incident between herself and her father that occurred when Crystal was 19 years old, which she never reported to the authorities. (RP 246, 248, 261) According to Crystal, she was watching television in her parents' bedroom, when Tvedt walked in fresh from taking a shower. (RP 246) Tvedt sat down next to Crystal and asked her to give him a "blow job." (RP 246) Crystal refused, and Tvedt grabbed her head and tried to push it towards his groin. (RP 246, 247) Crystal struggled and Tvedt released her, then Crystal ran to her bedroom. (RP 246)

A short time later, Tvedt called to her and said that he was sorry. (RP 247) He explained that he was having some troubles with her mother. (RP 247) Tvedt also pleaded with Crystal that she not tell her mother. (RP 248) Crystal testified that she told Naylor about the incident a few days later. (RP 248-49) Naylor and Buchanan testified that they recalled being told about the incident when they were all in high school together. (RP 269-70, 337-38) However, when the police detective investigating H.P.'s allegation asked Crystal if she had ever been sexually abused, she

told him no. (RP 181, 261) Crystal also did not warn H.P. to be careful around Tvedt. (RP 250)

Tvedt testified on his own behalf, and denied that he demanded and received oral sex from H.P., and denied ever demanding oral sex from Crystal. (RP 463, 475) Tvedt explained that he awoke to find H.P. taking money out of his suitcase. (RP 455-56) Tvedt yelled at H.P., and she became upset and begged Tvedt not to tell anyone. (RP 456-57, 458)

Tvedt testified that H.P. went to the bathroom, and upon reflection he felt badly that he had yelled at her. (RP 458) So he went to the bathroom to apologize and ask that H.P. tell Crystal what she had tried to do. (RP 458, 459) Tvedt testified that he noticed H.P. was holding a brown hand towel, which he had earlier used to clean semen off of himself after he masturbated in the shower. (RP 459)

Tvedt decided that he should leave, so he called Crystal to tell her. (RP 459) He packed some of his belongings including his toiletries and the brown towel, which he threw on the front seat of his car. (RP 459, 461-62)

A defense investigator testified that she recovered a brown towel from the front seat of Tvedt's car after his arrest. (RP 486,

487-88) Subsequent forensic tests identified the presence of semen on the towel. (RP 542) A forensic scientist also conducted an experiment and determined that semen deposited on a towel could be rubbed off onto a cotton fabric, such as a t-shirt, and that the cotton fabric would retain sufficient amounts of seminal fluid to allow for DNA testing. (RP 543-44, 547-48, 555)

IV. ARGUMENT & AUTHORITIES

The State sought to introduce Crystal's testimony regarding Tvedt's prior alleged sexual misconduct under either RCW 10.58.090 or ER 404(b). (RP 56, 91-97; CP 8-24) RCW 10.58.090(1) provides, in relevant part:

> In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

And under ER 404(b),

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The State argued that the testimony was admissible under

either the statue or under the court rule because it showed a common scheme or plan. (RP 56, 91-97; CP 8-24)

The trial court ruled that the testimony was admissible under RCW 10.58.090, but it was not admissible under ER 404(b) because the long passage of time and fact that there was just one alleged prior incident with only minor similarities did not indicate a common scheme or plan. (RP 100-02)

A. THE TRIAL COURT ERRED WHEN IT ADMITTED CRYSTAL PITTMAN'S TESTIMONY OF PRIOR UNCHARGED CONDUCT UNDER RCW 10.58.090.

The Supreme Court held in State v. Gresham, that RCW 10.58.090 is unconstitutional because it violates the separation of powers doctrine. 173 Wn.2d 405, 432, 269 P.3d 207 (2012). Therefore, RCW 10.58.090 cannot be used in this case to justify the admission of Crystal Pittman's testimony.

As in Gresham, "[w]hen the support of RCW 10.58.090 is removed, we are simply left with evidence admitted in violation of ER 404(b)" and therefore must determine "whether, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." 173 Wn.2d at 433 (internal quotations omitted).

In Gresham, the Court concluded:

> We cannot conclude that the erroneous admission of Gresham's prior conviction was harmless error. Much of the testimony at trial was predicated on the fact of Gresham's prior conviction. . . . What would remain absent the erroneously admitted evidence would be J.L.'s testimony that Gresham had molested her and her parents' corroboration that Gresham had had the opportunity to do so, along with the investigating officer's testimony. There were no eyewitnesses to the alleged incidents of molestation. While this evidence is by no means insufficient for a jury to convict a defendant, there is a reasonable probability that absent this highly prejudicial evidence of Gresham's prior sex offense ... the jury's verdict would have been materially affected.

173 Wn.2d at 433-34 (citation omitted).

This evidence was unfairly prejudicial to Tvedt as well because the jurors were presented with inflammatory and disturbing testimony of an alleged sexual assault, which they would have been naturally inclined to treat as evidence of criminal propensity. The prejudicial potential of prior bad acts evidence is at its highest in sexual abuse cases. This is so because, as the Washington Supreme Court has recognized, "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citations omitted).

This is a classic credibility case and thus the jury is exceptionally likely to be persuaded by propensity arguments. Moreover, the prosecutor compounded this problem by making a propensity argument to the jury, arguing that "[t]his is what the defendant does[,]" and that "[w]hen the defendant is having problems with his life ... that's when he gets sexually aggressive. That's what he does." (RP 614) And, despite the fact that the State presented allegations of just two incidents in a span of over ten years time, the prosecutor went on to tell the jury:

> This is how the defendant operates, ladies and gentleman, he would sexually assault young girls who he had access to in a home, in the home where he was living. He had problems in his life. If he's under stress, this is what he does.

(RP 617) Thus, the prejudicial effect of Crystal's testimony was substantial in this case.

B. THE TESTIMONY WAS NOT ALTERNATIVELY ADMISSIBLE UNDER ER 404(B).

The State argued below, and is expected to argue again on appeal, that Crystal's testimony was admissible under ER 404(b). The State was and is incorrect.

A defendant must only be tried for those offenses actually charged. Therefore, evidence of other crimes must be excluded

unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Although ER 404(b) allows the admission of evidence of a "common scheme or plan," this is not an exception to the ban on propensity evidence. Gresham, 173 Wn.2d at 429. "Even when evidence of a person's prior misconduct is admissible for a proper purpose under ER 404(b), it remains inadmissible for the purpose of demonstrating the person's character and action in conformity with that character." Gresham, 173 Wn.2d at 429.

Before evidence can be admitted under ER 404(b) for the purpose of proving a common scheme or plan, it must satisfy four requirements: the prior acts must be (1) proved by a

preponderance of the evidence, (2) admitted for the purpose of proving a common scheme or plan, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). The State's burden to demonstrate admissibility is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

Crystal's testimony fails to satisfy the second and fourth prongs of the test.

1. *Crystal Pittman's allegation does not demonstrate a common scheme or plan because it is too distant in time and is dissimilar to H.P.'s allegation.*

To prove a common scheme or plan, the other crime evidence must demonstrate "that the person 'committed markedly similar acts of misconduct against similar victims under similar circumstances.'" State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996) (quoting Lough, 125 Wn.2d at 852). Stated another way, the "prior misconduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." Carleton, 82 Wn. App. at 684

(quoting Lough, 125 Wn.2d at 860).

The Supreme Court has recognized two types of evidence of a common scheme or plan admissible under ER 404(b):

> The first type involves multiple crimes that constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the crime charged. An example of this type is a prior theft of a tool or weapon, which is used to perpetrate the subsequent charged crime, such as a burglary. . . . a second type of common scheme or plan . . . involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes.

DeVincentis, 150 Wn.2d at 19. To show the second type of "plan," the "degree of similarity" between the prior bad acts and the charged crimes "must be substantial." DeVincentis, 150 Wn.2d at 20.

For example, in DeVincentis, the court noted that the proposed evidence showed "that the defendant had devised a scheme to get to know young people through a safe channel, such as a friend of his daughter, or . . . as a friend of the next-door neighbor girl" and used that familiarity to lure the children into an isolated environment in which he proceeded to groom them through wearing little clothing and asking for massages. 150 Wn.2d at 22. The conclusion of this scheme was the actual criminal behavior—

sexual contact. 150 Wn.2d at 22. The trial court in that case very carefully analyzed the similarity of the prior bad act evidence and excluded some of the acts, finding them dissimilar. 150 Wn.2d at 23.

In contrast to DeVincentis, Crystal's allegations do not describe any "plan" or "scheme." In fact, the primary similarity between the stories told by Crystal and H.P. is the clear lack of a "plan" or "scheme" on Tvedt's part, rather than a common one. According to Crystal, Tvedt took advantage of an opportunity on one day over ten years ago when they were home alone. (RP 61, 246) He did not arrange for her to be alone. He did not groom her. It happened only once, despite the fact that they lived in the same home for several years after the incident. (RP 67) Likewise, H.P. described no planning or grooming, instead describing something that happened on the spur of the moment without preamble or build-up.

While there are superficial similarities between the prior bad act and the charged crime, the only true similarities common to both allegations are the sex act requested and a subsequent apology. (RP 61, 62, 196, 204, 246, 247) These similarities are not substantial enough to become relevant as a common scheme

or plan rather than merely propensity evidence.

But there are marked dissimilarities, as noted by the trial court:

> Under 404(b), I cannot find it's a common scheme or plan, I simply can't. I don't think it's enough because of the passage of time, because there are only two incidents, and although there's an apology involved in both, there was a threat here that was not present before. I don't find enough indicia, if I look at the case law under 404(b), to say that it is admissible.

(RP 102) Furthermore, Tvedt initially requested or demanded intercourse with H.P., not oral sex. (RP 195). And, unlike the H.P. incident, Tvedt did not expose himself to Crystal and did not force her to complete the act. (RP 62, 67, 246)

The prior bad act evidence in this case does not bear "marked similarities" that demonstrate "'such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.'" DeVincentis, 150 Wn.2d at 19 (quoting Lough, 125 Wn.2d at 860). Consequently, the State cannot show that it was an abuse of discretion for the trial court to exclude Crystal's testimony under ER 404(b).

2. *The prejudicial nature of this highly inflammatory testimony outweighs its relevance and is therefore inadmissible under ER 404(b) and ER 403.*

Prior bad act evidence can be admitted only where "its probative value clearly outweighs its prejudicial effect." Lough, 125 Wn.2d at 862; ER 403. The trial court found, for the purposes of RCW 10.58.090, that the testimony was not unduly prejudicial. (RP 100-01) The court was incorrect, as its minimal probative value is far outweighed by its prejudicial impact. Thus, the testimony is also inadmissible under ER 404(b) for this same reason.

DeVincentis notes several relevant considerations to consider in making this determination, such as the age of the victim, the need for the evidence, the absence of physical proof, and the absence of corroborating evidence. 150 Wn.2d at 23. In this case, H.P. was old enough to competently testify on her own behalf, and the State had DNA evidence to support her testimony, so the probative value and necessity of this testimony was low.

The probative value of Crystal's testimony must be weighed against the prejudicial impact of the evidence. The Supreme Court's decision in Lough is instructive on this point. In Lough, the defendant was charged with drugging and then raping his victim while she was unconscious. The State attempted to introduce

evidence from four other women that over a ten-year period, Lough had raped them in a similar manner. The trial court allowed the women's testimony as evidence of a common scheme or plan to drug and rape women. Lough, 125 Wn.2d at 849-50.

On appeal, the Supreme Court considered three factors in deciding that the probative value of the testimony clearly outweighed its prejudicial effect. These factors were subsequently discussed in State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996).

First, the court found the evidence highly probative because it showed the same design or plan on a number of occasions. Krause, 82 Wn. App. at 696. That is not true in this case. As discussed above, there is no "plan" or "scheme" described by the witnesses in this case, much less a "common" one. Thus, unlike Lough, the allegations here lack the "marked similarities" that would increase the probative value of the prior bad act evidence.

The second factor identified by the Lough court was the need for the ER 404(b) testimony because the victim was drugged during the attack and not entirely capable of testifying to the defendant's actions. Lough, 125 Wn.2d at 859. Only by hearing from all of the witnesses would a clear picture of events emerge.

Krause, 82 Wn. App. at 696. Again, this is not true in Tvedt's case. H.P. was 13 years old at the time of the alleged incident and 15 years old at trial, and therefore fully able to testify for herself. Compare State v. Kennealy, 151 Wn. App. 861, 890, 214 P.3d 200 (2009) (noting that the young age of alleged victims when they testified supported admission).

The third factor identified in Lough was the repeated use of a limiting instruction. Krause, 82 Wn. App. at 696. In this case, as set forth in detail below, the instruction given to the jury was not a proper limiting instruction for ER 404(b) evidence and did not limit the purpose for which the jury could consider the evidence. Moreover, even if a proper instruction had been given, "[c]ourts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696 (and cases cited therein).

Thus, the inapplicability of the three Lough factors in this case shows that Crystal's testimony was not more probative than prejudicial, and therefore would not have been admissible under ER 403 and ER 404(b).

C. EVEN IF THE TESTIMONY WAS ADMISSIBLE UNDER ER 404(B), ITS ADMISSION IN THIS CASE IS STILL ERROR BECAUSE THE TRIAL COURT DID NOT GIVE AN APPROPRIATE LIMITING INSTRUCTION.

When evidence of other misconduct or crimes is admitted under ER 404(b), it should be accompanied by a limiting instruction under ER 105 directing a jury to disregard the propensity aspect of the evidence and focus solely on its proper purpose. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000); State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (pointing out "vital importance" of a limiting instruction to stress limited purpose of evidence). In this case, the court gave a jury instruction for Crystal's testimony that did not properly limit the purpose of the testimony to finding a common scheme or plan rather than propensity or other improper purpose. (CP 83) The instruction given to the jury in this case stated:

> Evidence has been admitted in this case alleging that the defendant committed a previous sexual offense. The defendant is not on trial for any act, conduct or alleged offense not charged in this case.
>
> Evidence alleging a prior sexual offense is not sufficient, on its own, to prove the defendant guilty of any sex crime charged in this case.
>
> Further, this evidence is limited to your deliberations on count I of the information charging the defendant with rape of a child in the second degree.

> The state has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the crimes charged against him.

(CP 83). Because the trial court did not admit Crystal's testimony under ER 404(b), and because RCW 10.58.090 permitted the consideration of such testimony for any purpose, the defense did not object to this instruction. (RP 589)

In holding that a similar instruction given under RCW 10.58.090 was inadequate, the Supreme Court reasoned:

> An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, 173 Wn.2d at 423-24. The instruction given in this case is legally insufficient because it did not tell the jury the limited purpose of the ER 404(b) evidence and did not inform them that it could not be used to show that the defendant acted in conformity with his supposed character.

Failure to give an ER 404(b) limiting instruction is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, 173 Wn.2d at 425 (citing State v. Smith, 106 Wn.2d 772,

780, 725 P.2d 951 (1986)). In Gresham, the Court held that the error was harmless for the companion case because the remaining evidence, including the victim's detailed testimony and a recorded phone conversation of the defendant admitting the charged molestation, persuaded the court that the result was not materially affected. 173 Wn.2d at 425.

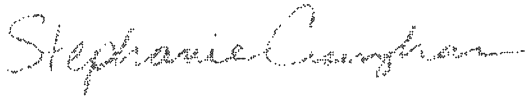
That is not true in this case. Credibility was the primary issue in this case, which left jurors particularly vulnerable to an instruction that failed to prevent them from using the prior evidence for propensity purposes. Thus, even if the trial court could have or should have admitted Crystal's testimony under ER 404(b), reversal of Tvedt's conviction is still required.

V. CONCLUSION

The trial court erred by permitting the admission of unfairly prejudicial prior bad act evidence through the testimony of Crystal Pittman, and by refusing to grant a new trial after the Supreme Court ruled that RCW 10.58.090 is unconstitutional. There is no alternative basis for admission of this evidence, and its admission is not harmless under the facts of this case. Furthermore, even if this Court holds that the evidence may have been admissible under ER 404(b), the lack of a proper limiting instruction is prejudicial.

For these reasons, Peter Tvedt respectfully asks the Court to reverse his convictions and remand for a new trial.

DATED: June 18, 2012



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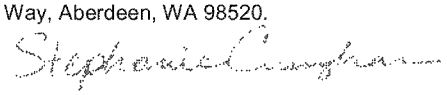

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